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cc:
Subject: NEPA

CQ505

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To Whom it May Concern:

It is clear that NEPA is not working as intended by Congress. The intent of the NEPA process is to ensure that impacts to the environment are considered in agency decision-making. The NEPA process is supposed to be a procedural process and not a substantive one. It has become substantive in the sense that costly process and interminable appeals very often force cancellation of proposed actions. Instead of being one element to consider in the decision-making process, NEPA has become the overriding consideration in any decision.

Following are some specific concerns with how NEPA is currently being administered, and some suggestions for improvement.

NEPA analysis must consider the "human environment." The NEPA statute requires a statement be included "in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment." Despite this requirement, the "human environment" rarely receives more than a perfunctory glance. These cursory reviews often are separate from any consideration of natural environmental impacts. The human element is an important part of the "environment" in which decisions are made.

Council on Environmental Quality (CEQ) and action agencies need to specify in regulations the social and economic impacts on people within a decision area and must be better addressed as part of the environmental analysis. Moreover, these social and economic analyses must be considered as part of the entire analysis.

Economic interests must be given standing to challenge NEPA actions to the same extent as environmental interests. A number of federal courts, most notably in the 9th and 10th federal circuits comprising the area where most NEPA analyses are conducted, have held that people whose economic interests are impacted by NEPA analyses do not have standing to challenge those analyses. These courts reason that NEPA is an environmental statute, and economic interests are not within the "zone of interests" to be protected by NEPA.

These cases make a process that is already biased against social and economic concerns even more so. As indicated in the Forest Service's report entitled "How Statutory, Regulatory, and Administrative Factors Affect National Forest Management," action agencies routinely over-analyze impacts and attempt to tailor their products so they will withstand legal challenges. If economic interests are excluded from this review process, agencies can ignore the social and economic impacts of an action without fear of challenge. By the same token, they over-emphasize the natural environmental impacts of an action to insulate them from lawsuits from environmental interests. The result is a

process that completely and unfairly shuts out one important part of the total "environment" from a critical part of the NEPA process.

A regulatory recognition of the inclusion of social and economic interests as part of the "human environment"—like Congress intended—would help to restore some semblance of balance to this process. NEPA regulations should take the further step of explicitly recognizing social and economic interests—as part of the "human environment"—have standing to challenge NEPA analyses to the same extent as other interests.

The "no action alternative" needs to be clearly defined as the status quo. NEPA was generally intended to apply to new projects or new federal activities. Courts and agencies have required NEPA analyses also be conducted for ongoing activities, such as renewal of federal permits. For example, the agencies have said federal livestock grazing permits must undergo NEPA analysis prior to renewal.

The action agencies are required to consider a "no action alternative" as part of their NEPA analysis. That alternative is supposed to be the status quo—what happens if nothing different is done. It is meant to serve as a baseline upon which other alternatives may be considered and compared. For new projects, the "no action alternative" is the state of affairs if a permit were not granted or the action did not take place. That is clear.

For ongoing projects or for permit renewals, however, the situation is different. The "status quo" in these cases is the condition as if the permit were ongoing or if the action were permitted to continue on its present terms. In the case of grazing permits, environmental conditions are reviewed every year to some degree as the agency determines appropriate stocking rates. Yet this is not the way agencies have interpreted the "no action alternative."

Agencies construe the "no action alternative" to be the non-renewal of a permit or the discontinuance of the particular action. This is not the status quo. Non-renewal of permits, for example, can result in significant changes in environmental conditions from the conditions that existed while the permit was in operation. As such, it is not a true baseline, as the "no action alternative" was intended to be. The impacts from non-renewal of a permit or discontinuance of an activity need to be considered separately.

The "no action alternative" needs to be clarified to mean the true environmental baseline upon which different alternatives can be measured. For permit renewals or ongoing activities, the only true baseline is the condition as if the permit or activity were continued.

4. CEO and the action agencies must regain control over defining the scope and requirements of NEPA analyses. One of the major problems with the NEPA process is it is being run by the courts in a piecemeal and a case-by-case basis. The statutory provisions of NEPA are very broad, with plenty of room for agency interpretation. Instead of taking advantage of this opportunity, the agencies have let court decisions from different parts of the country dictate the process on a piecemeal basis. The result is an uncertain process in which agency personnel doing NEPA work are not sure what the requirements are. As a result, agencies often do much more analysis than is necessary, or spend more time trying to insulate their work from judicial attack. They become mired in the process. The Forest Service estimates that planning and assessment consumes 40

percent of direct work, at a cost of \$250 million. The agency also estimates it could re-direct \$100 million to on-the-ground work with more efficient processes. The Forest Service is not alone.

Agencies would obtain greater efficiencies with NEPA if requirements were spelled out more clearly and administrative uncertainties were minimized. NEPA gives the federal agencies, in conjunction with CEQ, the authority to define and develop procedures "which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations." (43 U.S.C. 4332 (B)).

CEQ should better and more clearly define key NEPA terms such as "major federal action," "no action alternative" and "significant impacts on the human environment," so action agencies have a better idea of what their requirements are. NEPA processes need to be better and more clearly defined in order to withstand judicial attack. The NEPA Task Force needs to develop a clear administrative roadmap for satisfying NEPA requirements, enact it into regulations, and defend it in court. While a certain amount of agency flexibility is necessary to accommodate different agency situations, CEQ should take a stronger position on core elements of key aspects of the NEPA process.

Thirty years of NEPA litigation should tell us where the major problem areas are, and what areas need to be fixed. CEQ is charged with enacting regulations to implement NEPA, and the creation of the Task Force provides the opportunity for reviewing NEPA and revising its process. Strong CEQ regulations could help the executive branch reclaim control over the NEPA process. In so doing, it would guide agencies to become more efficient and effective in the way they discharge their NEPA responsibilities.

These are just some of the many areas of review to be addressed. But we emphasize 1 and 2 explanations listed above.

Sincerely,

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